TABLE OF CONTENTS

	Page
Motion to Dismiss Appeal	1
Statement	2
Argument	3
Conclusion	9

TABLE OF CITATIONS

CASES:

Boston & Maine Railroad Co. v. United States of America, 358 U.S. 68 (1958) 8

Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO v. Missouri, 361 U.S. 363 (1960) 8

United States of America v. United States Smelting, Refining & Mining Company, 339 U.S. 186 (1949) 4

STATUTES:

Title 28 U.S.C. Section 1253, 62 Stat. 928 3

Title 28 U.S.C. Section 2101(b), 62 Stat. 961 4

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 54(b) 7

Rule 65(b) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1393

The National Small Shipments Traffic Conference, Inc.,
and
Drug and Toilet Preparation Traffic Conference,
Appellants,

v.

Ringsby Truck Lines, Inc., et al., Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

MOTION TO DISMISS

Pursuant to Rule 16, paragraph 1(a) of the Revised Rules of this Court, Ringsby Truck Lines, Inc., and the other Appellees, who were plaintiffs in the court below, respectfully move that the appeal be dismissed on the following grounds:

(1) The appeal was not taken timely.

(2) The appeal seeks determination of questions which are moot.

(3) The Interstate Commerce Commission accepted the remand from the court and entered its report and order on reconsideration, thereby precluding an appeal by these intervenors.

STATEMENT

This is a direct appeal from an interlocutory memorandum opinion and order of a three-judge district court.

The appellees are motor common carriers that filed a complaint in the United States District Court for the District of Colorado, seeking judicial review of the report and order of the Interstate Commerce Commission in *Increased Class & Commodity Rates, Transcontinental,* 326 I.C.C. 397 (J.S. App. B). The Commission had ordered cancelled a three percent general increase in motor common carrier rates and charges, which the Commission found had not been shown to be just and reasonable. Appellants, The National Small Shipments Traffic Conference, Inc., and Drug and Toilet Preparation Traffic Conference, which had not been parties to the proceeding before the Commission, were permitted by the court to intervene as defendants. These intervenors included a counterclaim in their answer to the complaint.

The district court, constituted as a three-judge court, on January 5, 1967, vacated and set aside the Commission's order and remanded the matter to the Commission for further proceedings in conformity with the court's memorandum opinion and order (J.S. App. A). The court made no disposition of the intervenors' counterclaim.

The Interstate Commerce Commission reopened the proceeding for reconsideration on the record as made. The Commission's report and order on reconsideration, *Increased Class & Commodity Rates, Transcontinental,* 329 I.C.C. 420, was decided February 1, 1967, and served February 9, 1967 (J.S. App. C).

On February 27, 1967, the motor common carriers returned to the United States District Court for the District of Colorado, seeking judicial review and to have the court set aside, annul and enjoin the order of the Commission issued after remand from the court (J.S. 8). The defendants United States of America and Interstate Commerce Commission have filed their answer. Briefs are being filed pursuant to a stipulation approved by the court.

On March 6, 1967, The National Small Shipments Traffic Conference, Inc., and Drug and Toilet Preparation Traffic Conference filed and served their notice of appeal to the Supreme Court of the United States from the memorandum opinion and order of the district court made and entered on January 5, 1967. Neither the United States of America, the Interstate Commerce Commission nor any other intervenor filed a notice of appeal.

ARGUMENT

The appellants have appealed from an interlocutory memorandum opinion and order of the district court. The appeal was not timely because it was not taken within the time prescribed by the statute.

Title 28 U.S.C. Section 1253 provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an

order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Title 28 U.S.C. Section 2101(b) provides:

> Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

In *United States of America v. United States Smelting, Refining & Mining Company,* 339 U.S. 186 (1949), a three-judge district court held that the Interstate Commerce Commission orders were unlawful because not supported by evidence and remanded the matter to the Commission. No appeal was taken from the decision. On remand the Commission, without taking more evidence, again entered cease and desist orders against the carriers. The district court again held the orders unlawful. In answer to the argument that the first order of the district court was the law of the case because no appeal had been taken, this Honorable Court held at page 198:

> Finally it is contended that the District Court judgment should be affirmed because there was no appeal from the judgment and mandate when the case was sent back to the Commission, the court having found that there was no evidence to sustain a Commission finding that the line-haul rates were not compensatory for the services rendered. Appellees argue that that decision became the law of the case. The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided,

> that should end the matter. * * * It is not applicable here because when the case was first remanded, nothing was finally decided. The whole proceeding thereafter was *in fieri*. The Commission had a right on reconsideration to make a new record. * * * When finally decided, all questions were still open and could be presented. The fact that an appeal could have been taken from the first order of the District Court was not because it was a final adjudication but because a temporary injunction had been granted in order to maintain the status quo. This was an interlocutory order that was appealable because Congress, notwithstanding its interlocutory character, had made it appealable. (Citations omitted)

The United States of America and the Interstate Commerce Commission did not appeal from the memorandum opinion and order of the court below. Instead, the Interstate Commerce Commission reopened the proceeding for reconsideration in attempted compliance with the remand from the court. Anticipating further review proceedings before the United States District Court for the District of Colorado, the Commission provided in its order at 329 I.C.C. 428 that the date for compliance with its order would be automatically postponed if its Office of the Secretary or Office of the General Counsel were served with a further complaint in that or any other court. By incorporating such provision in its order the Commission eliminated the necessity for a temporary restraining order or an interlocutory injunction to maintain the status quo pending further review.

The interlocutory nature of the memorandum opinion and order of the district court is emphasized by reference to the fact that defendant Interstate Commerce Commission accepted the remand and reopened the proceeding.

The greater portion of appellants' jurisdictional statement is devoted to the restraining order and matters incidental thereto, which are all interlocutory. Appellants have asserted that the restraint on the operation of the Commission's order imposed by a single district judge was permitted to remain in effect from September 9, 1966, to January 5, 1967 (J.S. 4). Appellants have inadvertently overlooked the order dated November 4, 1966, following a full and complete hearing on the merits and all pending motions. That order was signed by each of the three judges of the district court and ordered that the temporary restraining order shall be and remain in effect in accordance with all the terms and provisions thereof until the determination of the application for interlocutory injunction by the court. That order was dispositive of all the motions made by the appellants.

Appellants' reference to Rule 65(b) of the Rules of Civil Procedure is also inappropriate. The temporary restraining order was entered by District Judge Hatfield Chilson on September 9, 1966, following a hearing pursuant to notice. The defendants were represented by Milton C. Branch, Esq., Assistant U.S. Attorney, and William F. White, Esq., appeared on behalf of intervenors. The restraining order was not granted without notice. Furthermore, Rule 65 specifically does not apply to actions brought under Section 2284. See Subsection (e) relating to district courts of three judges.

Appellants included a counterclaim in their answer to the complaint. The memorandum opinion and order of the court below made no findings or decision with respect to that counterclaim, but merely remanded the matter to the Commission for further proceedings in conformity with the court's opinion.

Rule 54(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon the express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

The court below did not make the findings contemplated by Rule 54(b); it did not direct the entry of a final judgment; no final judgment was entered. The memorandum opinion and order of the court below, entered January 5, 1967, was merely interlocutory. The time for appeal from such order was limited to thirty days by Title 28 U.S.C. Section 2101(b) and expired February 6, 1967. The appellants waited until the sixtieth day after the entry of the order of the court below. The notice of appeal having been filed on March 6, 1967, was not timely.

Appellants are asking this Honorable Court to review questions about the temporary restraining order and various matters related thereto. All such questions are moot. The restraining order is no longer in effect. The order of the Interstate Commerce Commission against which the restraining order was operative is no longer existent. Following remand from the district court, the Commission reopened the proceeding and issued its report and order on reconsideration, which is now pending before the same court below for further judicial review. No question as to temporary restraining order, interlocutory injunction or surety bond can arise, because the Interstate Commerce Commission postponed the date for

compliance with its new order pending further judicial review.

Appellants' arguments relating to the temporary restraining order, their motions for bond, security arrangements, impounding funds, and so on, are moot. There is no relief which the Honorable Supreme Court could give appellants, assuming that the district court below was in error. Appellants ask the Court, in effect, to rule on an abstract principle of law and lay down the rules for guidance in future cases. This Honorable Court has traditionally and historically refused to entertain such proceedings. Nothing this Court may do by reference to the temporary restraining order or appellants' sundry motions before the district court below can in any way affect the parties that are before it. These issues are now of academic interest only. Appellants can win nothing by their abstract point. Compare *Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO v. Missouri*, 361 U.S. 363, 367, 371, (1960) and cases therein cited. The passage of time and the action of the Interstate Commerce Commission in itself staying its report and order now pending below have relegated this entire matter to historical interest alone. The issues are legally moot.

This appeal should also be dismissed on the authority of *Boston & Maine Railroad Co. v. United States of America*, 358 U.S. 68 (1958). In that case this Honorable Court dismissed an appeal from a judgment of a three-judge district court remanding a matter to the Interstate Commerce Commission, when the Commission expressed its readiness to proceed in accordance with the terms of the district court's remand.

In view of the fact that the Interstate Commerce Commission has issued its report and order on reconsideration

in attempted compliance with the terms of the remand, there is actually no pending controversy as to the memorandum opinion and order of the court below and issues relative thereto are moot.

CONCLUSION

Since this appeal is from an interlocutory memorandum opinion and order of the court below and was not filed within the period prescribed by statute, and since the Interstate Commerce Commission undertook to comply with the court's memorandum opinion and order by issuing a report on reconsideration which is now under review in the same court below, and since the issues are moot, the appeal should be dismissed.

Respectfully submitted,

LeGrand Alf Carlston
Z. L. Pearson, Jr.
4045 Pecos Street
P. O. Box 5746, T. A.
Denver, Colorado 80217

Alvin J. Meiklejohn, Jr.
David E. Driggers
420 Denver Club Building
Denver, Colorado 80202
Attorneys for Appellees

June 9, 1967